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OFFICE OF PETITIONS

In re Application of
Min-hwa Chi
Application No. 09/865,929
Filed: May 24, 2001
Attorney Docket No. 004192.P053D

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed August 29, 2003 to revive the above-identified application.

The petition to revive under 37 CFR 1.137(a) is **DISMISSED**.

This application became abandoned for failure to timely submit the issue and publication fees, as required by the Notice of Allowance and Fee(s) Due which was mailed May 16, 2003. The Notice of Allowability set a three (3) month statutory period for reply. Extensions of time were not available under the provisions of 37 CFR 1.136(a). Accordingly, this application became abandoned on August 17, 2003. This decision precedes the mailing of a Notice of Abandonment.

PETITION TO REVIVE UNDER 37 CFR 1.137(a)

A grantable petition under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

Commissioner to have been "avoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

Petitioner asserts the issue and publication fees were timely deposited with the U.S. Postal Service on August 18, 2003. However, on August 19, 2003, via a review of a mail log, it was discovered an employee put insufficient postage on the envelope containing the fee transmittal form. The envelope containing the fee transmittal form was returned for insufficient postage on August 20, 2003. Petitioner argues there was a business routine in place to determine the proper amount of postage required for outgoing mail. Petitioner further contends this employee was sufficiently trained and reliance on this employee to perform this clerical function was an exercise in due care.

Petitioner's arguments have been considered but they are not persuasive to establish unavoidable delay. A grantable petition under the unavoidable standard based upon error on the part of an employee in the performance of a clerical function will establish, among other things, the error was the cause of the delay, there was a business routine in place for performing the clerical function that could reasonably be relied upon to avoid errors in performance and the employee was sufficiently trained and experienced with regard to the function and routine for its performance and that such reliance upon such employee represented the exercise of due care. See In re Egbers, 6 USPQ2d 1869, 1872 (Comm'r Pat. 1988), rev'd on other grounds sub nom., Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg, 10 USPQ2d 1787 (D.D.C. 1988); In re Katrapat, 6 USPQ2d 1863, 1867-68 (Comm'r Pat. 1988).

Petitioner needs to provide additional evidence to establish the error in postage was the cause of the delay and that the employee was sufficiently trained. Evidence which will be helpful includes but not limited, to statements from persons with direct knowledge of the circumstances surrounding the delay. This would include a statement from the employee who put the incorrect postage on the envelope and a statement from the supervisor who discovered the error the next day. Any statement should explain why the business routine outlined in the petition was not followed and why the system in place failed. Petitioner should also provide a copy of the mail log in question as well as a statement indicating the type of training the employee received. Petitioner has established there was a business routine in place however, sufficient evidence has not been established that the employee received sufficient training.

Alternative Venue

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 C.F.R. § 1.137(b) must be accompanied by the required reply (already submitted), the required petition fee, and a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. § 1.137(b) was unintentional.

The filing of a petition under 37 C.F.R. § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 C.F.R. § 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 C.F.R. § 1.137(b).

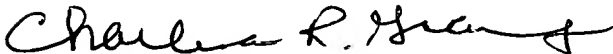
Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries should be directed to the undersigned at (703) 306-0251.



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